

Supreme Court, U. S.  
**FILED**

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**MICHAEL RODAK, JR., CLERK**

IN THE

**Supreme Court of the United States**

**October Term, 1977**

**No. 77-1315**

**JAMES F. LAWRENCE, ROBERT G. KNOTT, MAR-  
THA McLANAHAN, ELIZABETH B. PARKINSON  
and 215 EAST 72ND STREET CORPORATION,**

*Petitioners,*

*vs.*

**JOSEPH B. KLEIN, as Chairman, PHILIP P. AGUSTA,  
as Vice Chairman, and HARRY M. CARROLL, JOHN  
J. WALSH, JOHN B. CINCOTTA, as Members of the  
Board of Standards and Appeals of the City of New  
York, SAMUEL LINDENBAUM, as Applicant, 72ND  
STREET ASSOCIATES and DAVID BERG,**

*Respondents.*

**REPLY BRIEF IN SUPPORT OF PETITION FOR  
CERTIORARI.**

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Appeals of the City of New York, SAMUEL  
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REPLY BRIEF IN SUPPORT OF PETITION  
FOR CERTIORARI

Pursuant to Rule 24(4) of the Rules  
of the Supreme Court of the United  
States, petitioners James F. Lawrence,  
et al., interpose this reply brief  
addressed to two arguments first raised  
in the briefs in opposition, to wit: (1)  
the argument that this petition was  
filed too late; and (2) the argument

that the petitioners have raised a question concerning the professional expertise of counsel who represented respondents Samuel Lindenbaum, 72nd Street Associates and David Berg in the proceedings below.

## ARGUMENT

### POINT I

THE PETITION FOR CERTIORARI  
HAS BEEN DULY FILED.

The brief in opposition interposed by respondents Samuel Lindenbaum, et al., filed too late, in that,

"The order of dismissal of September 13, 1977 was the final determination by the State's highest court on the federal constitutional question presented, and was not subject to further review in the state courts." (p.3)

The principal case cited in support of that proposition is Cox Broadcasting v. Cohn, 420 U.S. 469, 481-5 (1975). In Cox Broadcasting Corp. v. Cohn, supra, this Court referred to Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945), for the rule that the determination of what is a "[f]inal judgment of decree" within the meaning of that language in Title 28, of the United States Code, 28 U.S.C. § 1257,

"had not been administered in such a mechanical fashion and that there were circumstances in which there has been 'a departure from this requirement of finality for federal appellate jurisdiction.'" Cox Broadcasting Corp. v. Cohen, supra at 477.

In Cox, this Court went on to state that:

"These circumstances were said to be 'very few,' ibid.; but as the cases have unfolded, the Court has recurrently encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state court to come." Id. (emphasis supplied).

In this action there were "further proceedings...to come" in the highest state court. Those further proceedings were the proceedings on petitioners' motion to it for leave to appeal to that court, preceded by a similar motion in the Appellate Division, First Department. Had petitioners filed their petition for certiorari before the making of and determination on the applications for leave to appeal to the Court of Appeals, the review which they would have been seeking would not have been a review of the final action of the highest state court. This Court might have been required to act on the petition to it for certiorari at the same time that the highest court of New York State might have been reviewing the judgment of the Appellate Division. There were "further

proceedings in the [highest] State court to come." Cox Broadcasting Corp. v. Cohen, supra at 477.

Indeed, had petitioners filed their petition for certiorari in this Court without exhausting their rights to secure review in the highest court of New York State, respondents herein could have, and no doubt would have, argued that the petition was improperly filed, and if by the time that this Court rendered such ruling the time had passed to seek further review in the highest state court, petitioners would have been out of both courts.

The rights of petitioners to move in the Appellate Division and in the Court of Appeals for leave to appeal to the Court of Appeals, and the power of the Appellate Division and the Court of Appeals to act on such applications did not constitute "a latent power in the [Court of Appeals] to reopen or revise its judgment." Market St. Ry. Co. v. Railroad Commission, 324 U.S. 548, 551 (1945). The petitioners herein had the right to seek reversal of the judgment they seek review of in this Court by further proceedings in the highest state court.

Respondents Lindenbaum, et al., to buttress their argument, made without authority, concerning the timeliness of the filing of the petition herein, charge petitioners with disingenuousness in not annexing to their petition a copy of the order of the Court of Appeals dismissing the petitioners' appeal to the Court of Appeals taken as of right, and in stating that that Court rendered "no opinion" (p.2).

Petitioners' statement was absolutely correct. The Court of Appeals rendered no opinion and, because it rendered no opinion, petitioners specifically pointed out to this Court, at page 10 of their petition, the ground of the motion by respondents Lindenbaum, et al., to dismiss the appeal to the Court of Appeals taken as of right.

## POINT II

NO ISSUE HAS BEEN RAISED CONCERNING "THE PROFESSIONAL EXPERTISE OF COUNSEL" (P. 16, LINDENBAUM BRIEF IN OPPOSITION) FOR RESPONDENTS.

Respondents Lindenbaum, et al., raise the subject of "the professional expertise of counsel," meaning Mr. Lindenbaum, before the Board of Standards and Appeals. The charge is made that petitioners raised that question by not setting forth in their petition the whole of a paragraphs of the Citizens Union study (p.16) The portion omitted is that portion in which the Citizens Union stated that the fact that Mr. Lindenbaum, and another attorney handling matters in Brooklyn, seldom lose a case "can partially be explained by several factors including the professional expertise of the said attorneys."

Petitioners verily believe that nothing in their petition can be deemed "to give an unfavorable, if not sinister case, derogatory of respondent Lindenbaum's experience and expertise n this field." To obviate any further question, however, concerning the Citizens Union study and

what it says and means, there is appended to this reply brief the text of the whole section of that study from which the quotes have been taken.

#### CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

CITIZENS UNION RESEARCH FOUNDATION, INC.  
OF THE CITY OF NEW YORK

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THE BOARD OF STANDARDS AND APPEALS:  
AN ANALYSIS OF THE DECISION-MAKING PROCESS

by

Nancy E. Haycock

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## 1. The Applicants

More than half of the Manhattan applicants were professional developers or realtors. In Brooklyn, the largest group of applicants were businesses:

### STATUS OF THE APPLICANT BY BOROUGH

STATUS	MANHATTAN		BROOKLYN	
	#	%	#	%
Professional developer or realtor	43	55.1	15	16.9
Individual	4	5.1	14	15.7
Business	20	25.6	39	43.8
Non-profit organization	10	12.9	21	23.6
Other	1	1.3	0	0

This concentration may reflect the high cost of obtaining a variance. A bulk variance may cost anywhere from \$2000 to \$6000. A change of use variance will often cost as much as \$10,000.

Of the 168 cases that came before the Board, the applicants were represented most often by an attorney or an architect.

TYPE OF REPRESENTATION	NUMBER	PERCENT
Attorney	71	42.3*
Architect	69	41.1
Engineer	16	9.5
Other	9	5.4

In many cases it is essential for an applicant to have the most qualified representation he can afford. If a representative cannot answer a question during a hearing, Commissioner Klein, (Chairman of the Board) will admonish him to bring an architect

\* Attorneys actually appeared in more than 100 cases, but they were the primary representatives in 71 cases.

or an engineer, and he will re-schedule the hearing.

Attorney representation was further broken down to those firms which appeared most often.

<u>ATTORNEY</u>	<u>NUMBER</u>	<u>PERCENT</u>
Lindenbaum	28	16.7
Rothkrug	24	14.3
Salvati	9	5.4

Samuel Lindenbaum was involved only in Manhattan cases, 89% of the time as a representative of a professional developer. He was the attorney in 76% of the cases involving buildings of more than 16 stories.<sup>14</sup> In Brooklyn, Leonard Rothkrug was the most frequent representative; 60% of all of his cases were businessmen. It is worth noting that seldom did either of these attorneys lose a case. This can be partially explained. Both these attorneys make effective presentations; they are well-prepared with persuasive legal, policy and planning arguments. Another factor is that these attorneys can be very selective in their choice of clients. Most attorneys are paid on a contingent fee basis and so they will not accept a case unless there is a good chance of success. This is not a full explanation, but clearly these attorneys have a good idea of what sways the Board.

14. Samuel Lindenbaum is the preferred attorney of large developers such as Samuel Lefrak and Paul and Seymour Milstein.